

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DISCOVER PROPERTY & CASUALTY
INSURANCE COMPANY, ST. PAUL
PROTECTIVE INSURANCE COMPANY,
TRAVELERS CASUALTY & SURETY
COMPANY, TRAVELERS INDEMNITY
COMPANY AND TRAVELERS PROPERTY
CASUALTY COMPANY OF AMERICA,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, NFL
PROPERTIES, LLC, ALTERRA AMERICA
INSURANCE COMPANY, FIREMAN'S
FUND INSURANCE COMPANY, TIG
INSURANCE COMPANY, CENTURY
INDEMNITY COMPANY, FEDERAL
INSURANCE COMPANY, GREAT
NORTHERN INSURANCE COMPANY,
GUARANTEE INSURANCE COMPANY,
HARTFORD ACCIDENT &
INDEMNITY COMPANY, NORTH RIVER
INSURANCE COMPANY, U.S. FIRE
INSURANCE COMPANY, ACE AMERICAN
INSURANCE COMPANY, ILLINOIS UNION
INSURANCE COMPANY, ALLSTATE
INSURANCE COMPANY, AMERICAN
GUARANTEE AND LIABILITY
INSURANCE COMPANY, ARROWOOD
INDEMNITY, COMPANY, CHARTIS
SPECIALTY INSURANCE COMPANY,
CHARTIS PROPERTY CASUALTY
COMPANY, CONTINENTAL CASUALTY
COMPANY, CONTINENTAL INSURANCE
COMPANY, ILLINOIS NATIONAL
INSURANCE COMPANY, MUNICH
REINSURANCE AMERICA, INC.,
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA, NEW
ENGLAND REINSURANCE
CORPORATION, ONEBEACON AMERICA

Index No. 652933/2012

ANSWER OF DISCOVER PROPERTY &
CASUALTY INSURANCE COMPANY
AND ST. PAUL PROTECTIVE
INSURANCE COMPANY TO THE
AMENDED COUNTERCLAIMS AND
CROSS-CLAIMS OF THE NATIONAL
FOOTBALL LEAGUE AND NFL
PROPERTIES LLC

INSURANCE COMPANY, VIGILANT
INSURANCE COMPANY, WESTCHESTER
FIRE INSURANCE COMPANY, XL
INSURANCE AMERICA, INC., DOE
DEFENDANTS 1-100
Defendants.

**ANSWER OF DISCOVER PROPERTY & CASUALTY COMPANY AND
ST. PAUL PROTECTIVE INSURANCE COMPANY TO THE AMENDED
COUNTERCLAIMS AND CROSS-CLAIMS OF DEFENDANTS,
NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES LLC**

Plaintiffs Discover Property & Casualty Insurance Company (“Discover”) and St. Paul Protective Insurance Company (“St. Paul”) hereby answer the Amended Counterclaims and Cross-Claims of the National Football League (“NFL”) and NFL Properties LLC (“NFL Properties”) (collectively, the “NFL Parties”) as follows:¹

The Insurance Policies

1. Discover and St. Paul admit that Cross-Claim Defendant TIG Insurance Company and/or its predecessor issued one or more insurance policy to the NFL Parties. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 1 of the Amended Counterclaims and Cross-Claims.

2. Discover and St. Paul admit that Cross-Claim Defendant North River Insurance Company issued one or more insurance policy to the NFL. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 2 of the Amended Counterclaims and Cross-Claims.

¹ The NFL Parties’ Amended Counterclaims and Cross-Claims begin with two unnumbered paragraphs and a footnote that define terms and the relief sought by the NFL Parties. These paragraphs contain no allegations of fact to which a response is required from Discover or St. Paul. To the extent these unnumbered paragraphs and footnote make allegations to which a response is required from Discover or St. Paul, those allegations are denied.

3. Discover and St. Paul admit that Cross-Claim Defendant U.S. Fire Insurance Company issued one or more insurance policy to the NFL. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 3 of the Amended Counterclaims and Cross-Claims.

4. Discover and St. Paul admit that Cross-Claim Defendant Guarantee Insurance Company issued one or more insurance policy to the NFL. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 4 of the Amended Counterclaims and Cross-Claims.

5. Discover and St. Paul admit that Cross-Claim Defendant Hartford Accident & Indemnity Company issued one or more insurance policy to the NFL. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 5 of the Amended Counterclaims and Cross-Claims.

6. Discover and St. Paul admit that Cross-Claim Defendant Century Indemnity Company's predecessor issued one or more insurance policy to the NFL. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 6 of the Amended Counterclaims and Cross-Claims.

7. Discover and St. Paul admit that Cross-Claim Defendant Great Northern Insurance Company issued one or more insurance policy to NFL Properties. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 7 of the Amended Counterclaims and Cross-Claims.

8. Discover and St. Paul admit a predecessor of Discover issued insurance policies to NFL Properties during the period of March 31, 1988 to March 31, 1989 and March 31, 1996

to March 31, 1997, but state that the policies speak for themselves. Discover and St. Paul deny all allegations contained in Paragraph 8 of the Amended Counterclaims and Cross-Claims that are inconsistent with or different from terms of those policies.

9. Discover and St. Paul admit a predecessor of St. Paul issued insurance policies to NFL Properties during the period of March 31, 1984 to March 31, 1988 and March 31, 1989 to March 31, 1996, but state that the policies speak for themselves. Discover and St. Paul deny all allegations contained in Paragraph 9 of the Amended Counterclaims and Cross-Claims that are inconsistent with or different from terms of those policies.

10. Discover and St. Paul admit that Cross-Claim Defendant Federal Insurance Company issued one or more insurance policy to NFL Properties. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 10 of the Amended Counterclaims and Cross-Claims.

11. Discover and St. Paul admit that Cross-Claim Defendant OneBeacon America Insurance Company and/or its predecessor issued one or more insurance policy to NFL Properties. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 11 of the Amended Counterclaims and Cross-Claims.

12. Discover and St. Paul admit that Cross-Claim Defendant Chartis Property Casualty Company issued one or more insurance policy to NFL Properties. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 12 of the Amended Counterclaims and Cross-Claims.

13. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the Amended Counterclaims and Cross-Claims.

14. To the extent Paragraph 14 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, no answer is required from them. To the extent Paragraph 14 of the Amended Counterclaims and Cross-Claims relates to Discover and St. Paul, Paragraph 14 contains conclusions of law and no response is required. Discover and St. Paul admit they issued insurance policies to NFL Properties as set forth in Paragraphs 8 and 9 above, but state the insurance policies speak for themselves. Discover and St. Paul deny all allegations contained in Paragraph 14 that are inconsistent with or different from the terms of those insurance policies. Discover and St. Paul deny any remaining allegation contained in Paragraph 14 of the Amended Counterclaims and Cross-Claims.

15. To the extent Paragraph 15 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, no answer is required from them. To the extent Paragraph 15 of the Amended Counterclaims and Cross-Claims relates to Discover and St. Paul, Paragraph 15 contains conclusions of law and no response is required. To the extent a response is required, Discover and St. Paul admit they issued insurance policies to NFL Properties as set forth in Paragraphs 8 and 9 above, but state the insurance policies speak for themselves. Discover and St. Paul deny all allegations contained in Paragraph 15 that are inconsistent with or different from the terms of those insurance policies. Discover and St. Paul deny any remaining allegation contained in Paragraph 15 of the Amended Counterclaims and Cross-Claims.

16. Discover and St. Paul admit they issued insurance policies to NFL Properties as set forth in Paragraphs 8 and 9 above, but state the insurance policies speak for themselves. Discover and St. Paul deny all allegations contained in Paragraph 16 that are inconsistent with or different from the terms of those insurance policies. Discover and St. Paul deny that all conditions precedent to coverage under the St. Paul and Discover policies have been performed, have occurred or have been excused, satisfied or waived. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 16 of the Amended Counterclaims and Cross-Claims.

The Underlying Lawsuits

17. Discover and St. Paul admit that the NFL Parties have been named in numerous lawsuits, including lawsuits asserting class action claims against the NFL Parties. The allegations of those suits speak for themselves. Discover and St. Paul deny any allegation made herein that is contrary to the allegations made in those lawsuits. Discover and St. Paul admit that many of these lawsuits have been transferred and centralized in a single multi-district litigation proceeding in the U.S. District Court for the Eastern District of Pennsylvania. Discover and St. Paul admit that a settlement class has been certified as part of the multi-district litigation proceeding. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 17 of the Amended Counterclaims and Cross-Claims.

18. Paragraph 18 of the Amended Counterclaims and Cross-Claims contains conclusions of law and no response is required. To the extent a response is required, Discover and St. Paul admit that the NFL Parties entered into a Class Action Settlement concerning the Underlying Lawsuits dated June 25, 2014 and amended on February 13, 2015. Further, Discover

and St. Paul admit the Class Action Settlement does not resolve or settle all of the Underlying Lawsuits. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of any remaining allegation contained in Paragraph 18 of the Amended Counterclaims and Cross-Claims.

19. Discover and St. Paul admit the allegations contained in Paragraph 19 of the Amended Counterclaims and Cross-Claims.

20. Paragraph 20 of the Amended Counterclaims and Cross-Claims contains conclusions of law and no response is required. To the extent a response is required, Discover and St. Paul admit certain objectors-appellants petitioned the Supreme Court of the United States for writs of *certiorari* on August 30, 2016 and September 26, 2016, and the petitions were denied on December 12, 2016. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 20 of the Amended Counterclaims and Cross-Claims.

21. Discover and St. Paul admit approximately 146 retired players and about 19 relatives of such players have opted out of the class settlement and admit certain opt-outs have pending lawsuits. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 21 of the Amended Counterclaims and Cross-Claims.

22. Discover and St. Paul admit the NFL Parties have retained Paul Weiss as lead defense counsel in the Underlying Lawsuits and engaged other firms in certain jurisdictions. Discover and St. Paul deny that NFL Properties have incurred more than \$31 million in costs in defending the Underlying Lawsuits and are without knowledge or information sufficient to form

a belief as to the truth of the remaining allegations contained in Paragraph 22 of the Amended Counterclaims and Cross-Claims.

Duty to Defend Insurers' Failures to Defend

23. To the extent Paragraph 23 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of those allegations. Discover and St. Paul deny the NFL has demanded Discover or St. Paul defend it against the Underlying Lawsuits. Discover and St. Paul admit NFL Properties notified Discover and St. Paul of certain Underlying Lawsuits and demanded a defense against those Underlying Lawsuits.

24. To the extent Paragraph 24 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of those allegations. Discover and St. Paul deny acknowledging an obligation to defend the NFL in any lawsuit. Discover and St. Paul admit they have offered to participate in the defense of NFL Properties. Discover and St. Paul further state their communications with NFL Properties regarding the duty to defend were in writing and speak for themselves. Discover and St. Paul deny any allegation of Paragraph 24 of the Amended Counterclaims and Cross-Claims that mischaracterizes or inaccurately states the contents of those communications. Discover and St. Paul, for the reasons stated in their Amended Complaint, do not have a duty to defend NFL Properties, but continue to pay a share of NFL Properties' alleged defense costs.

25. To the extent Paragraph 25 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of those allegations.

Discover and St. Paul deny the remaining allegations contained in Paragraph 25 of the Amended Counterclaims and Cross-Claims.

26. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of any remaining allegation contained in Paragraph 26 of the Amended Counterclaims and Cross-Claims.

27. Discover and St. Paul deny that the NFL Parties have submitted defense cost invoices to Discover and St. Paul totaling approximately \$31 million. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of any remaining allegation contained in Paragraph 27 of the Amended Counterclaims and Cross-Claims.

Count I – Cause of Action for Breach of Contract as to the Duty to Defend

**(As and for a Counterclaim Against Discover, St. Paul, and Pacific and Cross-claims
Against the Remaining Duty to Defend Insurers)**

28. Discover and St Paul repeat and incorporate by reference their answers to Paragraphs 1-27 of the Amended Counterclaims and Cross-Claims as though fully set forth herein.

29. To the extent Paragraph 29 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, no answer is required from them. Discover and St. Paul deny the remaining allegations contained in Paragraph 29 of the Amended Counterclaims and Cross-Claims.

30. To the extent Paragraph 30 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, no answer is required from them. Discover and St. Paul deny the remaining allegations contained in Paragraph 30 of the Amended Counterclaims and Cross-Claims.

31. To the extent Paragraph 31 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, no answer is required from them. Discover and St. Paul deny the remaining allegations contained in Paragraph 31 of the Amended Counterclaims and Cross-Claims.

Count II – Cause of Action for Declaratory Relief as to the Duty to Defend

**(As and for a Counterclaim Against Discover, St. Paul, and Pacific and Cross-claims
Against the Remaining Duty to Defend Insurers)**

32. Discover and St. Paul repeat and incorporate by reference their answers to Paragraphs 1-31 of the Amended Counterclaims and Cross-claims as though fully set forth herein.

33. Paragraph 33 of the Amended Counterclaims and Cross-Claims contains a description of the relief sought by the NFL Parties and does not require a response. To the extent a response is required, Discover and St. Paul deny the NFL Parties are entitled to any of the relief sought.

34. To the extent Paragraph 34 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, no answer is required from them. To the extent Paragraph 34 of the Amended Counterclaims and Cross-Claims relates to Discover and St. Paul, Paragraph 34 contains conclusions of law and no response is required. To the extent a response is required, Discover and St. Paul deny the remaining allegations contained in Paragraph 34 of the Amended Counterclaims and Cross-Claims.

35. To the extent Paragraph 35 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, no answer is required from them. Discover and St. Paul admit that certain Underlying Lawsuits remain pending. Discover and St. Paul are without knowledge or information sufficient to form a belief as to the truth of

the remaining allegations contained in Paragraph 35 of the Amended Counterclaims and Cross-Claims.

36. To the extent Paragraph 36 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, no answer is required from them. Discover and St. Paul deny the remaining allegations contained in Paragraph 36 of the Amended Counterclaims and Cross-Claims.

37. To the extent Paragraph 37 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, no answer is required from them. Discover and St. Paul admit there is a controversy between the NFL Parties and them as to the existence and extent of any duty to defend.

38. To the extent Paragraph 38 of the Amended Counterclaims and Cross-Claims contains allegations against parties other than Discover and St. Paul, no answer is required from them. Discover and St. Paul deny the remaining allegations contained in Paragraph 38 of the Amended Counterclaims and Cross-Claims.

RESPONSE TO THE NFL PARTIES' PRAYER FOR RELIEF

Discover and St. Paul respectfully request that the Court deny the relief sought by the NFL Parties in their Amended Counterclaims and Cross-Claims, enter judgment in favor of Discover and St. Paul as to each count of the Amended Counterclaims and Cross-Claims, award Discover and St. Paul their costs and expenses, including reasonable attorneys' fees, incurred herein and award Discover and St. Paul any and all further relief in favor of Discover and St. Paul to which it is entitled at law or in equity.

AFFIRMATIVE DEFENSES**FIRST AFFIRMATIVE DEFENSE**

The NFL's claims may be barred, in whole or in part, because the NFL is not an insured under the terms of the policies issued by Discover and St. Paul.

SECOND AFFIRMATIVE DEFENSE

NFL Properties' claims are barred, in whole or in part, to the extent coverage under the Discover and St. Paul policies is extinguished or limited because NFL Properties failed to perform the obligations, express or implied, under the terms of the policies issued by Discover and St. Paul.

THIRD AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, to the extent coverage under the Discover and St. Paul policies is extinguished or limited because of NFL Properties' unclean hands.

FOURTH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, because NFL Properties failed to comply with and/or perform conditions precedent to any obligation under the terms of the policies issued by Discover and St. Paul.

FIFTH AFFIRMATIVE DEFENSE

NFL Properties' claims are barred, in whole or in part, because the Discover and St. Paul policies do not cover intentional wrongdoing, expected bodily injury, or bodily injury that occurred before or after the policy period.

SIXTH AFFIRMATIVE DEFENSE

NFL Properties' claims are barred, in whole or in part, because the Discover and St. Paul policies do not cover bodily injury that was known to the NFL and/or NFL Properties prior to the policy periods.

SEVENTH AFFIRMATIVE DEFENSE

NFL Properties claims are barred, in whole or in part, because the bodily injury at issue in the Underlying Lawsuits was not caused by an occurrence, as that term is defined in the Discover and St. Paul policies.

EIGHTH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, because the NFL and/or NFL Properties had knowledge of the bodily injury at issue prior to the beginning of the policy period.

NINTH AFFIRMATIVE DEFENSE

Any potential obligation under the Discover and St. Paul policies is subject to the terms, limits and exclusions of the Discover and St. Paul policies.

TENTH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, to the extent coverage under the Discover and St. Paul policies is extinguished or limited by the applicable statute of limitation and/or laches.

ELEVENTH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, to the extent that any defense costs incurred by NFL Properties were not reasonable and/or necessary.

TWELFTH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, to the extent that NFL Properties breached its contractual obligations by not cooperating with Discover and St. Paul and not providing Discover and St. Paul with information with respect to the underlying claims.

THIRTEENTH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, to the extent that no coverage is available under the Discover and St. Paul policies for any settlements which were excessive or unreasonable.

FOURTEENTH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, to the extent that no coverage is available under the Discover and St. Paul policies for any settlements or payments made without the consent of Discover and St. Paul.

FIFTEENTH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, to the extent that the settlement of the underlying claims encompassed claims for punitive damages, which are awarded as a punishment and a deterrent and not as compensatory damages for bodily injury; it is moreover against the law and public policy to permit insurance coverage for punitive damages.

SIXTEENTH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, to the extent that a judgment in favor of NFL Properties will result in unjust enrichment.

SEVENTEENTH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, to the extent that NFL Properties has failed to mitigate its damages and therefore is barred from any recovery.

EIGHTEENTH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, to the extent that NFL Properties is not entitled to recover any damages, costs, attorneys' fees or any other relief.

NINETEENTH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, to the extent that Discover and St. Paul did not breach any contractual or other obligation allegedly owed.

TWENTIETH AFFIRMATIVE DEFENSE

NFL Properties' claims may be barred, in whole or in part, to the extent that the cross-claim fails to state a claim upon which relief can be granted.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Discover and St. Paul incorporate all applicable defense(s) asserted by any other similarly situated party that is/are applicable to Discover and St. Paul.

TWENTY-SECOND AFFIRMATIVE DEFENSE


Discover and St. Paul reserve their rights to assert additional affirmative defenses and/or supplement, alter or amend this Answer based upon claims and objections as revealed or suggested by the completion of ongoing investigation and discovery.

Respectfully submitted,

DISCOVER PROPERTY & CASUALTY
INSURANCE AND ST. PAUL PROTECTIVE
INSURANCE COMPANY,

By these attorneys,

POTNEY, TWOMBLY, HALL & HIRSON LLP

By: 

Thomas A. Martin
521 Fifth Avenue
New York, New York 10175
(212) 682-0020

and

Kevin J. O'Connor (BBO # 555249)
koconnor@hermesnetburn.com
Michael S. Batson (BBO # 648151)
mbatson@hermesnetburn.com
HERMES, NETBURN, O'CONNOR &
SPEARING, P.C.
265 Franklin Street, 7th Floor
Boston, MA 02110
T: (617) 728-0050
F: (617) 728-0052

Date: January 26, 2017